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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-61

PETER K. YONAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BENJAMIN S. ADAMOWSKI
PAUL D. NEWEY
ROBERT E. ADAMOWSKI
11 S. LaSalle Street
Chicago, Illinois 60603
STate 2-1144

Attorneys for Petitioner

FRANCIS X. RILEY
Of Counsel

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3988

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Now comes the Petitioner, Peter K. Yonan, by his attorneys, Benjamin S. Adamowski, Paul D. Newey, Robert E. Adamowski and Francis X. Riley, who prays that this Court issue its Writ of Certiorari to the Court of Appeals for the Seventh Circuit to review a final order of that Court, and alleges as follows:

OPINION.

The opinion of the Court below has not as yet been reported. It appears in Appendix A, *infra*, p. 1a.

JURISDICTION.

1. The final order was issued on April 12, 1973. Rehearing was denied on June 5, 1973. (Appendix B)

2. Jurisdiction of this Court is invoked to review that judgment pursuant to §1254(1) of the Judicial Code. (28 USCA)

QUESTIONS PRESENTED FOR REVIEW.

1. May an employee be found guilty of "fraud" under the statute (18 USCA 1341) where the record affirmatively establishes that the employer was not deceived at any time in any particular, did not lose that employee's loyalty at any time, did not lose its bargain, did not lose its property and did not lose its money?

2. May an employee be found guilty of "fraud" under that same statute, by the two perpendicular facts, of: (1) an employer buying from a supplier; and, (2)

the contemporaneous receipt of money by its employee from that supplier, with nothing more of record?

3. May an employee be found guilty of "fraud" under that same statute, when the employer at the time it learns of the receipt of money by the employee from its supplier; then: (1) makes a complete cost audit of its contract with the supplier, and makes no adjustment of any kind; and, (2) continues to purchase under that contract and those terms, to and including the day of trial?

4. Is a person denied a fair trial when forced to be tried with another, who has unsuccessfully, repeatedly sought to be a government witness to and including the day of trial, and who at trial is the only one of three defendants, who testifies in his defense and accuses the former person of a different and brutally felonious crime?

STATUTE INVOLVED.

The mail fraud statute (18 USCA 1341) reads, as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or

> spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The conviction in this case, extends this statute beyond limits heretofore recognized, and, therefore, "has decided an important question of Federal law which has not been, but should be, settled by this Court." (Sup. Ct. Rule 19, 1(b))

The doctrine of *United States* v. *Epstein* 6 Cir., 174 F. 2d 654, so heavily relied upon through the years in this field, has been summarily written off in a footnote herein, *infra*, p. 6a. The viability of *Epstein* should be determined by this Court, before the doctrine of this case is accepted as a rejection of it.

STATEMENT OF THE CASE.[1]

1. Indictment

On August 11, 1971, Peter K. Yonan, Irving H. Greensphan (hereafter, "Green") and Andrew George were indicted for mail fraud. (D. 2)[2] According to the indictment, Yonan was a buyer in the purchasing department of Zenith Radio Corporation; (hereinafter, "Zenith") (*id.* Par. 1) George did business as A & G Woodworking; (hereafter, "A & G") (*id.* Par. 2) and Green, President of Accurate Box, was a supplier of cabinets and cabinet components to Zenith. (*id.* Par. 3)

Using the language of the statute (18 USCA 1341) the indictment (Count I) charged these three individuals with devising a scheme to defraud Zenith by obtaining money from Zenith, (and its wholly owned subsidiaries) under false pretenses, knowing the pretenses to be false. (*id.* Par. 4) The scheme was described as follows:

Yonan, for Zenith, placed orders for cabinets with Accurate Box. (*id.*, 4a) George, for A & G, submitted invoices to Accurate Box, for "commissions and kickbacks" on these orders. (*id.*, 4b) Green paid A & G "based upon

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[1] There never was an issue of the mail element of this case. All of the business transacted, contemplated and delivered, used the mails in the usual discharge of duties. Those witnesses who testified to the billing, mailing and sending checks are omitted. Their testimony appears in the transcript. (T.92, 100-176, 226-239)

[2] "D" is the document number in the Common Law Record according to the District Court Clerk's docket entry index.

the number of cabinets and cabinet components" supplied to Zenith. (*id.*, 4c) George paid Yonan from the money A & G received from Accurate Box, "commissions and kickbacks." (*id.*, 4d)

The fraud specified was twofold. All defendants failed to disclose to Zenith that Yonan "was deriving commissions and kickbacks, which he converted to his own use," thus depriving Zenith of its money. (*id.*, 4e) They also "did continue to represent to Zenith" that Yonan was an honest and loyal employee, and failed to disclose the conflict of interest and disloyalty of Yonan to Zenith, depriving Zenith of Yonan's honest and faithful performance. (*id.*, 4f)

2. Summary of Evidence in Support of Indictment

The Government's case showed that Green (Accurate Box Corp.) was a supplier of cabinets to Zenith Radio Corporation for a radio commercially known as "Circle of Sound." Green was the sole, available supplier. From a contemplated 7,000 units, this item was a phenomenal financial success, and Green, during the critical period, supplied some 300,000 cabinets at a price of $28 plus.

During this period, A & G (Andrew George) billed Green for commissions (Gov. Ex. 3-1 through 3-58) totalling $300,296.10. Within this period the Government introduced checks from A & G to Yonan, an employee in the Purchasing Department of Zenith, totalling $100,469.77. (Gov. Ex. 4-1 to 4-17) No attempt was made by the Government to relate these parallel facts to the indictment. The two sets of documents were unrelated in every way: amount, time, percentage, and relationship.

This last item was that the Government at trial told the jury that the defendant George was the "bagman." On appeal when it was argued that a 70% bagman does not and cannot exist. The Government abandoned that theory entirely, arguing successfully that the receipt of money by an employee from a supplier, is the essence of, and is, in fact, the "fraud."

3. Government's Case in Detail

The Government's evidence in support of its charge of "fraud" came from three witnesses, and the calculated aid of the defendant Green, in his own defense: It follows:

I.

a. Lloyd Nanfield, called by the Government, said he was Director of Purchases for Zenith, and had been since late 1968, supervised the buyers. (T.34)[3] His department purchases all production items, domestically, for the parent company and its subsidiaries. (T.35)

The purchasing procedure was described by Nanfield as follows:

> "A. Yes. We have a product group that meets weekly and before this group are brought models by our stylists for their consideration for the Zenith coming product line. (T.35) These models would be selected by members of engineering, of sales and purchasing would have a representative in attendance at these meetings.

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[3] "T" references are to the Official Transcript of Proceedings, filed herein by the Clerk of the District Court.

Those models that were selected would be given to engineering to have blueprints or prints made up of the various components that would go into the production of an end product. We would get those prints, we would send them out for quotation and upon receipt of those quotes, we would have the responsibilities for selecting vendors to supply such materials required." (T.36)

Yonan had been a "buyer" since 1961, working directly under him (T.37) Yonan became manager of the cabinet section, negotiating for wood and metal cabinets, "but wood . . . was Pete's background." (T.38) Nanfield also knew Green. He is owner of Accurate Box and a supplier basically of vinyl covered cabinets, involved in the one model known as Circle of Sound. (T.39)

From June, 1967 to January, 1971, Yonan, as the question phrased it, had "primary or basic" responsibility for negotiating with Green. (T.40) Zenith, he said, has a conflict of interest policy in writing with its employees, and a written "no gifts" policy with volume suppliers. (A.43. See, G.Ex.6) Nanfield identified Yonan's endorsement on certain checks. (Ex. 4-1 to 17, except 12, 14, 17: T.49) He said, he had never been advised prior to December, 1970, that "Yonan was receiving commissions or a percentage of the amount that Zenith was paying for the merchandise sold to Zenith by Accurate Box." (T.50)

On cross examination, Nanfield said he became Yonan's supervisor in 1968, and promoted him to section manager, because he was "a good employee." (T.51) In 1966 and 1967, as buyer, Yonan was directly under Peter Maloney. In the Circle of Sound project, Yonan reported directly to Maloney. (T.52)

Green's attorney, on cross examination, brought out through Nanfield, that the "concept of a unit," originates with "our stylists . . . one hundred per cent of the time," who turn it over to the "Product Committee" for acceptance. (T.43) If accepted, the idea went to Engineering, who would engineer the components for the Production Department, wherein in sequence, it would go to Purchasing to purchase the components. (T.53-54) Volume bids were reviewed by Yonan with his immediate superior, Cardis. (T.59) Nanfield said, he knew of no favoritism to Green. (T.60)

He testified Yonan had primary responsibility for negotiating the purchase of cabinets for Circle of Sound cabinets in each year, 1966 through 1969. Maloney "would certainly have been interested." (T.61) This includes "obtaining bids." (T.62) It is true it was the policy for Maloney to approve Yonan's negotiations (T.63) depending on the dollar volume. (T.64) Nanfield couldn't say yes or no to approval for the Circle of Sound, when production projection rose from 7500 to 250,000 units. (*id.*)

b. Peter J. Maloney said, until he left Zenith he was a purchasing agent. (T.68) In 16 years, he was a technical adviser, cabinet division coordinator and purchasing agent. He left "June 30, 1969." (T.60) Yonan worked for him "to purchase cabinets, negotiate prices, arrange for delivery and follow up on quality." (*id.*) He knew Green as a Zenith supplier for six years. He met him through Yonan in 1963. (T.71) He said from June, 1967 to his departure, Yonan had the primary responsibility for negotiating with Green. (T.71) Maloney had no knowledge "whatsoever" that Yonan was receiving commissions for merchandise Accurate Box sold Zenith. (T.72)

On cross examination, he said Yonan was directly accountable to him. (*id.*) On Green's cross examination, he said "primary" meant to send out blueprints, get quotations, if too high "negotiate down" to acceptable levels. The blueprints came from Engineering. (T.73) Maloney had occasion to review quotes "prior to the time they went upstairs to his office," and on some occasions Maloney got them "directly." (T.74)

Maloney said a quotation form is sent with the blueprints (T.75) and contains material costs, labor costs, overhead, freight, profit and selling cost. Zenith did not always allow a ten percent profit, but it "was a permissible profit." However, he said, there were cases when a unit did not come out as quoted, because of unknown production problems, so "the supplier did not make ten per cent profit." (T.76)

As a general rule, according to Maloney, quotes went to two or three sources for comparisons. Yonan would get them. Then, "we" ("I include myself because I was in the review of who was going to make the product.") would decide which supplier could do the job at the best price. (T.77)

When bids were received for that new product, Maloney said, "we not only discussed it ourselves," but also with Sales. (T.78) A bid was accepted "after everybody passed on it," in conference. (T.79) Sales "had final say." (T.80) Maloney and Yonan would then agree on a supplier. Having agreed, Yonan would place the order. (T.81)

First, however, Sales would prepare a release, listing every model and quantity for a given period. Yonan had no part of this. He couldn't change the figures, or the

number to be ordered, including Model 565. (T.82) The price of these models was determined by a Sales Department within a bracket. Purchasing was done within that bracket. (T.83)

Maloney said, "in this particular product" there was no competition. (T.38) There were no other suppliers, except Accurate Box. Zenith tried M.P.I. of Mississippi, who were not interested. Al Berman of Evansville, Indiana, in which Zenith had a vested interest, refused because, "it would not fit into their product line." (T.84)

When Yonan accepted the bid on Circle of Sound, "it was the only bid we had." He brought it to Maloney, who took it to the Sales Department. Maloney continued:

"A. The Sales Department—may I say this in my own words?

Q. That is up to his Honor.

A. The model started out first of all as a walnut veneer model. When we received the blueprints from Engineering, they were sent out for quotations. All the quotations we received were clear out of our price bracket. (T.85)

So, then we resorted to alternate ways of doing it, trying to get the price down to somewhere, as I recall, around $28, which would have been an acceptable price to the Sales Department. We succeeded in doing that. That is when the model went into production.

Q. When you say "we," whom do you mean by "we"?

A. I am talking about the Sales Department was agreeable to the price. I thought it was a fair price,

and I think everyone involved thought it was a fair price." (T.86)

Maloney testified that the "ultimate responsibility," for negotiating bids and purchase orders was his in 1966-68, although the actual work was done by Yonan. (T.86-71) In that period Maloney knew of no Yonan favoritism to Green. (*id.*)

On redirect, Maloney said Yonan was responsible for selecting a source of supply, when a blueprint was received. (T.87-88) On recross, Maloney said the only other source of supply for the Circle of Sound was Modar in Michigan. (T.88) Yonan had them in to see us and they "couldn't make it at all." (T.89)

c. Calvin Kahn is a comptroller of Accurate Box, and has been since 1962. (T.180) He identified Government Exhibits 3-1 to 3-58, which are checks from Accurate Box to A&G, (T.182) and 5-1 through 5-37, invoices of A&G to Accurate Box. (T.184) Kahn said the invoices came in the mail, and represent commissions on sales. Kahn said to his knowledge no services or products were rendered in connection with those sales. (T.185) The checks in payment were mailed. (T.186)

Kahn talked to Yonan on the phone, (*id.*), "in the winter two or three years ago," (T.187) who wanted to know the total payments for a year to A&G. (*id.*) Exhibits 8-1 to 8-58 are listings of invoices from Accurate Box to Zenith. (T.188) They were prepared immediately after Exhibits 5-1 through 5-37. (T.192) Kahn was unable to say how the figure $288,235 on Exhibit 8-1 was arrived at. (T.195) The total amount relates to the figure indicated at 3.4 per cent. 8-1 through 8-57 were prepared

after receipt of Exhibits 5-1 to 5-37. (T. 197) Kahn knew Andrew George, who had been to his office, but he did not know whether he rendered any service or supplied a product. (T. 198)

Kahn said Bob Bugella is plant superintendent of Accurate Box and supervises its shipments. (T.199) Exhibit 5-36 has a notation, "Shipping quantities confirmed by Bob." (T.198) It is not further identified. (T.199)

On cross examination, he said, he started paying A&G in December, 1967, (T.201) with a check for $9,800. (T. 202) He did not know how many cabinets that was for, although he said he was paying a dollar a box on "certain cabinets." Later, he said, he "factored" a dollar a box into 3.4 per cent, (*id.*) which is what 8-1 to -58 is all about. (T.203)

The following then occurred, under questioning from Green's trial counsel:

"Q. And you have heard him scream and shout at Mr. Greenspahn, haven't you?

Mr. Frank Whalen: Well, I am going to object to this, your Honor.

The Court: I will sustain the objection about screaming and shouting. I don't know what that means anyway.

By Mr. Magidson: Q. Well, did you or did Accurate Box Corporation ever receive a letter from Mr. Yonan in which a picture of a tombstone and the inscription "R.I.P." was drawn over—

Mr. Frank Whalen: Object, your Honor. Object.

Mr. Lydon: Objection, your Honor. (T.203)

The Court: I will sustain the objection. Counsel refrain from asking any questions like that from here on. (T.204)

Kahn denied knowledge of work A&G had done for Accurate Box, June, 1967 to January, 1971, nor had he seen the A&G employee on the premises. (T.206) However, manufacturing was done in Wisconsin he said, and the financial offices were in Chicago, which is solely where he saw George. (T.207)

On redirect examination, he said the bills of A&G to Accurate Box established that depending on model, billing ranged from twenty cents to a dollar a box, (T.217-218) which he determined by dividing "quantity" into a dollar figure. (T.216-218)

II.

Then, the defendant, Green, took the stand and testified in his own defense. (T.419-528) His testimony was a second, digressive, different trial against the defendant, Yonan. Its main thrust was that Yonan extorted money from him, which he had earned through Zenith. Since ninety-five (95%) per cent of his production was for Zenith, (T.485) it would be practically impossible for Green to disburse money not earned from Zenith.

The extortion began, he said, "about Fall, 1967." (T. 445) Yonan made a date for lunch with him, and said, Green was going to make a lot of money, and that "he would like to have a dollar a unit for each unit that is manufactured." (T.452) Later, Green told Yonan that his business was set up so that cash could not be paid. (T.469) Yonan then told him to get A&G invoices for commissions and pay them. (T.471) Green recounted the conversation:

> "He said, 'This is going to be a very big unit with Zenith Radio.' I said to him, I couldn't be happier

because we felt that we really had probably the greatest part in getting this unit ready for Zenith Radio and for the market place. It was like us giving birth to a child and we were very happy to see that the child was thriving.

Then he said to me, 'You are going to make a lot of money on this suit because of the amount that you are going to be manufacturing.' He said that everybody and their uncle would like to get into this to manufacture this unit. I said to him that we had worked very hard on it and we certainly wanted to keep the business.

He said to me, he said—I am trying to think exactly. He said to me again that the unit was going to be a big unit. Again, I said that I couldn't be happier about the whole thing.

Then he said to me, 'I don't want you to be a pig about this.'

Mr. Frank Whalen: I object to this, your Honor.

The Court: I will show your objection. The objection is overruled. (T.451)

Mr. Frank Whalen: May I again ask to be heard, your Honor, on this point.

The Court: Well, I will hear you at 12:30.

By Mr. Bellows: Q. What did you say when he said, 'I don't want you to be a pig'?

A. I said to him, 'What do you mean that I shouldn't be a pig'? He said, 'Well, you have a full 10 per cent.' He said, 'You have a full 10 per cent allowed into this unit that Zenith allows their suppliers, and you have got a full 10 per cent in it.' I said, 'Well, that is a customary situation.'

He said to me, 'I would like to have a dollar a unit for each unit that is manufactured.' I looked at him, and I just felt that he had put so much time and effort and work into this unit—

Mr. Frank Whalen: I object, your Honor.

The Court: I will sustain the objection as to what you felt." (T.452)

The Court of Appeals rejected Green's story as inherently incredible. (*infra,* p. 10a)

The jury found all defendants guilty, (D. 59) and the Court entered a judgment on the verdict. (D. 60) Yonan was sentenced then most severely, to the penitentiary for three (3) years. (D. 65)

ARGUMENT.

The Writ of Certiorari should be granted in this case for four compelling reasons:

1. The decision here is of first magnitude and impression, as it has been repeatedly published by the United States District Attorney for the Northern District of Illinois since its rendition in both the District Court and Court of Appeals as a significant development in the law of mail fraud; thus, it should be reviewed by this Court.

2. An executive, since this decision, must have guidelines to know whether the sole receipt of money from a supplier of his employer, without more, constitutes the criminal conduct of fraud.

3. As this decision stands, fraud now is the receipt of money by an employee from a supplier of his employer, even when the record, as here, rebuts deception, loss of loyalty, loss of bargain, loss of property or loss of money.

4. The complexity of modern business with interlocking relationships at every end, in every conceivable combination, now has sinister and amorphous overtones of statutory fraud. Directions for prosecutors, courts and the potentially criminal businessman are now needed.

I.

The fraud charged in the indictment was a twofold scheme. First the accused didn't tell Zenith that Yonan "was deriving commissions and kickbacks, which he converted to his own use," thereby depriving Zenith of its

money. (D. 2, Par. 43) Second, they didn't tell Zenith of this conflict thereby depriving Zenith of Yonan's honest and faithful performance. (*id.*, 4f)

A. The second charge of fraud is affirmatively refuted of record by the Government's and Green's witnesses, and is met here first because it is the simpler.

The evidence is uncontradicted that Yonan performed his duties, without reproach from Zenith or its officers and supervisors. He always maintained quality control. The two witnesses most qualified to testify, Bugella and Green, said:

(Bugella) "Q. Did Mr. Yonan ever permit cabinets to be made in a shoddy fashion?

A. None whatsoever.

Q. Did he ever permit delay in shipments?

A. Permit what?

Q. Did he ever permit delay in shipments?

A. No, no.

Q. Did he ever permit bad workmanship to be used in the making of the cabinets?

Mr. Lydon: I will object to that question as calling for a conclusion.

He can testify as to facts.

Mr. Bellows: Well, it is the only way I know—

The Court: Well, did he ever permit—he wanted everything done according to specifications. Is that right?

The Witness: We wanted quality and production. (T.379)

• • •

(Green) A. Well, Mr. Yonan would make periodic visits to our plant which certainly was part of

his job. The periodic visits was to look at quality, to see how production was going, to see what he thought of our production. He did this quite often. He used to do it at least twice a month. . . ." (T.470)

In addition, six Zenith employees testified that Yonan never asked nor recommended favoritism or partiality for Green. (T.284, 312, 367, 395, 403, 410) Add to this, his efforts to obtain the best price: (T.63-4, 77-80) and, his demands for quality control at all times. (T.291, 293) Moreover, the record shows, (and this is crucial in the light of the Court of Appeals opinion) (*infra*, p. 6a) that Yonan made every effort to stimulate and to obtain competition in this item. Maloney, Yonan's immediate supervisor, said:

> There were no other suppliers, except Accurate Box. Zenith tried M. P. I. of Mississippi, who were not interested. Al Berman of Evansville, Indiana, in which Zenith had a vested interest, refused because, "it would not fit into their product line." (T. 84, 379)

This included Yonan's efforts to obtain competition.

> Maloney said the only other source of supply for the Circle of Sound was Modar in Michigan. (T.88) Yonan had them in to see us and they "couldn't make it at all." (T.89)

The Government never stressed the lack of loyalty on these grounds, and the Court of Appeals used it solely in terms of money, drawing an almost *res ipsa loquitur* inference. (*infra*, p. 8a)

B. This brings us to the fraud of Yonan getting Zenith's money.[*] "Kickback" is the hackneyed phrase of the Government, and the Court's opinion uses it eighteen (18) times. A review of the Government's evidence will amply prove that the word is not only inaptly used, but that the money wasn't Zenith's at all.

It is uncontradicted in this record that Zenith, not Yonan, designed the product, examined the costs, set the profit, accepted the price and named the only supplier available to produce the article. Not only uncontradicted, but repeatedly and affirmatively established is that Yonan demanded from Green, and got, quality production and performance. (T.60, 87, 279, 291, 294, 315, 325, 365, 389, 405, 413, 470)

Zenith got what it demanded in price and production for the Circle of Sound, and through Yonan, got an instrument that sold in quantities, undreamed. (T.437) It was impossible for Green, on the foregoing record, to have committed a fraud against Zenith. Green gave Zenith what it demanded, at the price and profit set by Zenith. (T.76) Zenith reviewed the cost and profit figures in depth in early 1968 (T.396; Green Exhibits 2A, B; T. 465) with Yonan's and Engineering's knowledge and approval, (T.397) and with Green's full cooperation. (T. 398-99) It concluded that "the prices contained in the manufacture," were reasonable. (T.399)

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[*] The Court of Appeals considered this part of the indictment irrelevant to the charge of fraud. "And it is of no moment whether or not the kickback money actually came from Zenith." (*infra*, p. 6a)

After Yonan retired from Zenith, in 1971, (T.488) Zenith, again, made a study in depth of Green's costs (Gr. Ex. 4) and that study "showed Accurate Box to be the most competitive bidder." (T.307)

Zenith admitted that its money in this product with Green was not the subject of a fraud. In December, 1970, Zenith (Nanfield) talked to Green about payments to A & G. (T.473, 477) In January, 1971, Green gave them the details. (T.479) In that month, Zenith reviewed its cost figures with Green, and confirmed them. (T.396-99, Gr. Ex. 2A)

Therefore, the record conclusively shows that Zenith did not, actually or metaphysically, (scheme *qua* scheme) give up its money, or its property or its bargain. It is a record fact that it exercised its bargain rights to and including the day of trial. (T.485) Thus, the *sine qua non* of fraud is wanting. "A scheme reasonably calculated to deceive persons or ordinary prudence and comprehension." (*Blachly* v. *United States*, 5 Cir., 380 F. 2d 665, 671) No scheme, no deception, of Zenith which was completely in control of every facet of this transaction was possible or probable. It didn't occur.

If it wasn't a kickback, or Zenith's money, or the loss of a bargain, or the loss of an employee's loyal services, then it isn't fraud.

II.

The Law

From the reading of the Statement of the Case, (*supra*, p. 5) this Court must conclude that the manifold reported cases involving bribery, confidence game, boiler room operations, stock manipulations, absentee land and

appliance sales maneuvers and such malignancies have no relevance to the facts here. (See, 174 F. 2d at 766, 767)[5]

This defendant not only relied upon *Rabinowitz* and its rationale, but, as the Court of Appeals noted, *infra*, p. 6a, fn. 5, he placed primary reliance upon *United States* v. *Epstein*, 6 Cir., 174 F. 2d 654, for its in-depth analysis of corporate business practices, the *caveat emptor* ethic of the business world, and criminal intent to steal another's goods.

Yonan also relied upon Judge Learned Hand's refutation of the "no loss" defense, when fraud has occurred. In *United States* v. *Rowe*, 2 Cir., 56 F. 2d 747, at 749, he wrote:

> "A man is nonetheless cheated out of his property when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. * * * he has suffered a wrong; he has lost his chance to bargain with the facts before him. This is the evil against which the statute is directed."

Not only did Zenith get the bargain it made, but after all the facts were known, it kept and continued that bargain, up to and including the day of trial. "Evidence of a satisfied customer is admissible in mail fraud to show an absence of fraudulent intent." *Post* v. *United States*, App. D. C., 407 F. 2d 319, 327; *Cert.* den. 393 U.S. 1092. Accord: *United States* v. *Regent Office Supply Co.*, 2 Cir., 421 F. 2d 1174, 1180-81.

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[5] In *United States* v. *Rabinowitz*, 6 Cir., 327 F. 2d 62, the Court recounts these frauds, and distinguishes the case of "the defendants * * * selling a sturdy well designed and well constructed device * * *." (at p. 66) Here, the device and the price and the service were supplied.

The Court below denigraded *Epstein* to a footnote, (*infra*, pp. 6a-7a), and said that Yonan had the duty to give "an assumedly unmerited kickback," (*id.*) to Zenith. That apophthegm was created on the same page of the opinion decreeing that it was of "no moment" whether Yonan got Zenith's money or someone else's.

But, the doctrine of *Epstein* is recognized in all circuits, and it should neither be overlooked nor overthrown, until this Court permits it.

The measure of fraud in the circumstances of this case is set forth at length in *United States* v. *Epstein*, 174 F. 2d 654. That conviction was reviewed and reversed. Briefly, the facts and holding follow.

Epstein, over a ten year period, developed two bankrupt breweries into successful businesses. The opinion sets out the business acumen exercised to do so. (*id.* 757-758) Epps is Epstein's brother. He started the busines of brewery supply. *id.* 758) He built it into a large and successful supplier. He supplied both his brother's corporate breweries, and the Government charged, while concealing his brother's interest, defrauded those breweries "by causing such companies to be charged excessive prices . . . to the financial loss and detriment of the breweries . . ." (*id.* 759)

In the indictment, the Government charged the submission of invoices at excessive prices, resulting in increased profits to Epps and his brother and losses to the corporattions. (*id.* 760) The court said this "was a charge of fraud with a dishonest, immoral purpose. . . . It was a charge of actual, active, intentional fraud." It required proof. (*id.*) (Here, the charges are conversion of Zenith's

money to Yonan's own use, (D.24, Par. 4e) and dishonesty, disloyalty and unfaithfulness to Zenith in doing so. (*id.* 4f. These, too, require proof.)

When the Government in *Epstein* failed to prove excessive prices and concomitant profits, (*id.* 761-762) it shifted its ground to prove that since Epps and his brother would profit from, "any price paid by the brewery . . . above the price Epps had paid . . . [it] was excessive." (*id.* 672) The trial court accepted that contention upon the theory that if Epstein, being a director of the breweries, had an interest in the supply company, he "would be guilty of a fraud if [he] secured . . . profits from [the supply company]," unless he had disclosed his interest to his stockholders. (*id.* 763)

The defense contended that non-disclosure, if profits were at fair prices, was at most constructive fraud. But, the Government had to prove active fraud as an essential element of the offense. The Government contended the conflict alone was an active fraud. The trial court found defendant guilty of fraud, "upon the ground that such an interest and profit would be a breach of fiduciary obligation . . ." (*id.* 764) The Appellate Court rejected that ruling and went on to discuss fraud and the mail fraud statute.

It contrasted the two concepts of fraud:

> "Courts speak of actual or active fraud as contrasted with constructive fraud. Actual fraud has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive or defraud. [Citation] To constitute

actual fraud, there must be such fraud as affects the conscience." [Citations] (at 765-766)

But, constructive fraud differs, not in degree, but in kind.

"Constructive fraud is a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. [Citations] Constructive fraud may be found merely from the relation of the parties to a transaction or from circumstances and surroundings under which it takes place. [Citation] It is said that constructive fraud is a term that means, essentially nothing more than the receipt and retention of unmerited benefits." (at 766)

In short, "fraud", as used in the statute (1341), is not a noun of varying intensity measured by its adjective. The two concepts are of totally and completely different genres. The former is within the reach of 1341, and the latter is not.

"In order to prove a scheme to defraud under the mail fraud statute, there must be proof of a scheme embracing active or actual fraud. A charge of using the mails to carry out a scheme to defraud cannot be maintained on proof of mere constructive fraud. In *Shushan* v. *United States*, 5 Cir., 117 F. 2d 110, 115, which was a case concerned with a fraudulent scheme to bribe public officials to secure excessive fees from the state, the court, in holding that this constituted an active fraud, said: 'We agree with appellants that the constructive frauds which equity in civil cases sometimes sets up to do justice will not suffice under this criminal statute; and that there must be a purpose to do wrong which is inconsistent with moral uprightness.' The same rule was empha-

sized and the foregoing statement adopted by the court in the subsequent case of *Bradford* v. *United States,* 5 Cir., 129 F. 2d 274." (174 F. 2d at 766)

The Government in *Epstein* insisted throughout that mere non-disclosure and profit were actual fraud. The Appellate Court accepted, *arguendo,* an Epps-Epstein fraud and then asked could mere disclosure make it moral, and answered it:

> "Certainly, a mere disclosure of interest could not convert an actual fraud with a wrongful purpose to injure or deceive, into an honest, moral transaction with a purpose to benefit. It is this consideration that serves as a criterion for distinguishing cases cited by the government to sustain its contention that lack of disclosure of interest—or secret profits, as the government terms it—proves actual fraud in this case." (At 768)

Zenith had it all. Its product, its price, its quality, its time schedule, and its permissible profit. Both, before and after disclosure. There was nothing for Yonan to disclose to Zenith. He cannot, therefore, have committed a fraud which the government couldn't prove, and which the Court below said was of "no moment."

CONCLUSION.

Wherefore, this petitioner prays that this Court issue its Writ of *Certiorari* to the Court below, to reverse the judgment of conviction and sentence, with directions to grant defendant a new trial.

Respectfully submitted,

BENJAMIN S. ADAMOWSKI
PAUL D. NEWEY
ROBERT E. ADAMOWSKI
11 S. LaSalle Street
Chicago, Illinois 60603
STate 2-1144

Attorneys for Petitioner

FRANCIS X. RILEY
Of Counsel

APPENDIX "A"

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1972 — JANUARY SESSION, 1973

Nos. 72-1553, 72-1554, 72-1555

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANDREW GEORGE, IRVING GREENSPHAN and PETER K. YONAN,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 CR 795

BERNARD M. DECKER,
Judge.

ARGUED FEBRUARY 12, 1973 — DECIDED APRIL 12, 1973

Before CASTLE, *Senior Circuit Judge,* FAIRCHILD and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* The three defendants were indicted for mail fraud in violation of 18 U.S.C. § 1341 and for aiding and abetting that fraud under 18 U.S.C. § 2. The indictment was ultimately in 18 counts.[1] The only variance in counts was that the last 17 involved additional mailing dates.

The indictment described defendant Peter K. Yonan as a cabinet buyer in the Purchasing Department of Zenith Radio Corporation. Defendant Andrew George

[1] The original Count 18 was dismissed and Count 19 became Count 18 prior to submission of the case to the jury.

was said to do business as A & G Woodworking Co. The other defendant, Irving H. Greensphan, was specified as president of Accurate Box Corporation, which supplied cabinets to Zenith.

The grand jury charged that from June 1967 through January 1971, the three friends devised a scheme to defraud Zenith whereby Yonan received kickbacks on Accurate Box Corporation's sales of cabinets to Zenith. To accomplish this, George allegedly submitted fictitious "commission" invoices of A & G Woodworking Co. to Greensphan's company. After these invoices were paid, George supposedly paid part of the proceeds to Yonan. The kickbacks were of course not disclosed to Zenith. The indictment alleged that the scheme deprived Zenith of its lawful money and property and of the honest and faithful performance of its employee Yonan's duties. The mailings mentioned in the indictment covered checks sent by Zenith to Greensphan's cabinet company before the latter was billed by George's company.

After a jury trial, the defendants were found guilty as charged. Yonan received a three-year sentence; George received a one-year sentence and was assessed a $1,000 fine on each count; and Greensphan received a six-month sentence and was ordered to pay a $1,000 fine on each count. On appeal, all defendants assert that the evidence was insufficient to convict them of mail fraud; George and Greensphan assail instructions; George complains of the court's receipt into evidence of Zenith's conflict-of-interest policy; and Yonan attacks the court's refusal to sever his trial from Greensphan's. We affirm.

The evidence brought forward at the trial disclosed a novel scheme. Yonan went to work for Zenith in 1961 and was a buyer in the cabinet division of Zenith's Purchasing Department. He had "primary responsibility" for negotiating with cabinet vendors, and, in the words of his immediate supervisor, that meant "his responsibility was to send out the blueprints and gather in quotations, and where the price was too high, to try to negotiate it down to a proper level." Of course, the quotations Yonan negotiated were reviewed by his superiors and by other departments of Zenith. In 1966, Yonan was given

the responsibility for finding and negotiating with a supplier of cabinets for Zenith's newly conceived "Circle of Sound" product. His responsibility also included arranging for delivery and monitoring the quality of the cabinets. His friend since the mid-fifties, defendant Greensphan, the owner of Accurate Box Corporation ("Accurate"), was tapped as the supplier. During the indictment years, Accurate was the sole bidder on and supplier of these cabinets. Yonan's supervisor thought Accurate's prices to be fair and reasonable, but in the absence of other bidders, could not conclude they were competitive. Zenith normally allowed its suppliers a maximum of 10% profit, and Accurate's prices reflected that profit margin. The Circle of Sound product proved to be a tremendous financial success. The Zenith checks listed in the indictment were received by Accurate in payment of the cabinets sold to Zenith.

Without recounting any actual threat by Yonan, Greensphan testified that he agreed to pay Yonan $1 per cabinet kickback on the model 565 Circle of Sound unit and later per cabinet kickbacks on other models because he was afraid he was otherwise going to lose Zenith's business. Yonan assertedly told him that "everybody and their uncle would like to get into this to manufacture this unit." He stated that Yonan's requests for such payments originated in October 1967. When he asked Yonan how the kickbacks were to be paid, Greensphan was told to pay A & G Woodworking Co.'s commission invoices. Greensphan never related these events to anyone at Zenith. He had known defendant George since 1960. He denied inflating any quotations to cover monies paid to Yonan.

Commencing in December 1967, Accurate received commission invoices from defendant George's A & G Woodworking Co. even though neither George nor A & G Woodworking Co. provided any services to Accurate. Accurate paid these invoices on the basis of a commission per unit on the types of models it shipped to Zenith.[2] Greensphan also cashed a $3,000 Accurate check

[2] On two Circle of Sound models, the commission was $1.00 per unit shipped, and on two others it was $.75 and $.20 per unit respectively.

payable to himself and gave the proceeds to George because he was fearful of losing Zenith's business. To conceal the set fee per unit commission on the cabinets shipped, Accurate's records showed the payments to George's company as 3.4% on monies Accurate received from Zenith rather than as fixed sums on each cabinet. However, on these records the total prices of the cabinets shipped to Zenith were not correct, but were altered to make the commissions correspond to 3.4% thereof. From December 1967 until December 1970, Accurate paid George's company in excess of $300,000 in commissions. During the period in which Greensphan's company was paying the commission invoices of George's company, the latter paid Yonan kickbacks in excess of $100,000 through checks made out by George.

The Government's theory, credited by the jury, was that the kickbacks to Yonan were accomplished by Greensphan's payments of George's company's fictitious commission invoices, with George then acting as a kickback conduit to Yonan. In this connection, it should be noted that in 1969 or 1970, Yonan asked Greensphan's company's controller for a report of the total commission payments then made by that company to George. Shipping quantities on at least one A & G invoice were confirmed to Yonan by Accurate's plant superintendent.

Zenith had a conflict-of-interest policy providing that no gratuities of any nature were to be bestowed on its Purchasing Department employees by suppliers. Yonan twice signed documents embodying that policy, which was annually brought to the attention of all suppliers of Zenith through letters sent out to them. Greensphan admitted receiving these letters during the period of time he was channeling the payments to Yonan.

A number of Zenith's employees testified that Yonan did not request preferential treatment for Greensphan and his company and that they had no knowledge of Yonan providing such treatment for them. It appears Yonan was insistent on quality and efficiency from Accurate.

Evidentiary Sufficiency of a Scheme to Defraud

The mail fraud statute[3] delineates two essential elements constituting the crime: a scheme to defraud and use of the mails in furtherance of the scheme. There is no dispute as to the sufficiency of the evidence to establish use of the mails, nor could there be. Defendants contend that the evidence was insufficient to satisfy the first element — the existence of a scheme to defraud. Reduced to its essential distillation, their argument is that because the kickbacks were never shown to come out of Zenith's pockets, as opposed to Greensphan's, because Yonan was never shown to provide or secure any special services for Greensphan and his company, and because Zenith was never shown to be dissatisfied with Accurate's cabinets or prices, no fraud within the contemplation of the statute can have occurred. We reject this argument, in part because it misses the point in two respects and in part because the particular scheme shown by the evidence to defraud Zenith is, from every defendant's point of view, within the reach of the mail fraud statute.

Since the gravamen of the offense is a "scheme to defraud," it is unnecessary that the Government allege or prove that the victim of the scheme was actually defrauded or suffered a loss. *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174, 1180-1181 (2d Cir. 1970); *Pritchard* v. *United States*, 386 F.2d 760, 766 (8th Cir. 1967); *Adjmi* v. *United States*, 346 F.2d 654, 657 (5th Cir. 1965); *United States* v. *Shavin*, 287 F.2d 647, 651-652 (7th Cir. 1961), certiorari denied, 375 U.S. 944. If there was intent on the

[3] 18 U.S.C.A. § 1341 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

part of a schemer to deprive Zenith of Yonan's honest and loyal services in the form of his giving Greensphan preferential treatment, it is simply beside the point that Yonan may not have had to (or had occasion to) exert special influence in favor of Greensphan or that Zenith was satisfied with Accurate's product and prices. And it is of no moment whether or not the kickback money actually came from Zenith. *United States* v. *Dorfman*, 335 F. Supp. 675, 679 (S.D.N.Y. 1971). Thus the district court correctly charged the jury that it was unnecessary for the Government to prove "that anyone actually be defrauded." Contrary to defendants' contentions, the evidence hardly shows that it was impossible for Yonan to exercise favoritism toward Greensphan. As the Court noted in *Shushan* v. *United States*, 117 F.2d 110, 115 (5th Cir. 1941), certiorari denied, 313 U.S. 574: "The fact that the official who is bribed is only one of several and could not award the contract by himself does not change the character of the scheme where he is expected to have influence enough to secure the end in view." In our view the evidence shows that Yonan did have opportunities to give Greensphan preferential treatment, particularly by avoiding the solicitation of potential competitors. Of course, the actual exercise of any such opportunity by a person in Yonan's position may be practically undetectable.

Furthermore, even if Yonan never intended to give Greensphan preferential treatment, and the Government does not argue that the evidence was sufficient to support a conclusion that he did, the defendants' argument still misses the mark. The evidence shows Yonan actually defrauded Zenith. We need not accept the Government's far-ranging argument that anytime an agent secretly profits from his agency he has committed criminal fraud.[4] Not every breach of every fiduciary duty works a criminal fraud.[5] But here Yonan's duty was to negotiate the best

[4] See *United States* v. *Faser*, 303 F. Supp. 380, 383-384 (E.D. La. 1969); *United States* v. *Hoffa*, 205 F. Supp. 710, 716 (S.D. Fla. 1962).

[5] See *Epstein* v. *United States*, 174 F.2d 754 (6th Cir. 1949). In that case, heavily relied on by defendants, two of the defendants had directorates in both breweries and brewery supply companies, and the Government argued that because the breweries bought from these suppliers and the defendants did not disclose their conflict-of-interest

price possible for Zenith or at least to apprise Zenith that Greensphan was willing to to sell his cabinets for substantially less money. Not only did Yonan secretly earn a profit from his agency, but also he deprived Zenith of material knowledge that Greensphan would accept less profit. There was a very real and tangible harm to Zenith in losing the discount or losing the opportunity to bargain with a most relevant fact before it. As Judge Learned Hand stated in a related context:

> "A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed." *United States* v. *Rowe*, 56 F.2d 747, 749 (2d Cir. 1932), certiorari denied, 286 U.S. 554.

Here the fraud consisted in Yonan's holding himself out to be a loyal employee, acting in Zenith's best interests, but actually not giving his honest and faithful services to Zenith's real detriment.

No refuge can be taken in Zenith's policy "normally" to allow suppliers a 10% profit and in Accurate's prices being within that margin. Nothing would have prevented Zenith from bargaining with Accurate for a lesser profit margin, and it would be unrealistic to presume that Zenith

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[3] (Continued)

positions, the defendants were guilty of mail fraud. The Court held such conduct was "constructive" and not "active" fraud and outside the purview of the mail fraud statute absent a showing that the supply companies' prices were unfair. Its rationale was that under applicable civil law, directors, on behalf of their corporations, could contract with themselves or corporations in which they were interested, and such contracts were completely valid so long as they were advantageous and made in good faith. Under these circumstances mere non-disclosure did not generate a profit at the corporation's expense. However, those defendants did not have a duty to make their profit — the return on their investment in the supply companies — available to the breweries, whereas Yonan did have a duty to make his profit — an assumedly unmerited kickback — available to Zenith. There was no reason to believe disclosure by the defendants in *Epstein* would have, under the particular circumstances there, made any bargaining difference to the breweries, but Yonan's disclosure, in addition to making the scheme impossible, would have enabled Zenith to realize a substantial discount.

would consider the fact of better than $100,000 in actual kickbacks to its buyers — over $300,000 in agreed-to-kickbacks — to be immaterial in its dealings with Greensphan. It is preposterous to claim that Zenith would have spurned such a discount if offered.

In this case, whether Zenith was to be deprived of Yonan's honest and faithful performance of his duties to the extent of his secretly profiting from his agency and concealing knowledge of the availability of that material sum from Zenith, or to the further extent of his meriting the payments which he received, a fraud within the reach of the mail fraud statute would be present.[6] The statute requires the existence of a scheme to perpetrate this fraud, and the question of evidentiary sufficiency boils down to whether the Government has proven that the defendants contemplated that Zenith suffer the loss of Yonan's honest and loyal services.

Indubitably the evidence showed a "scheme." The critical element is fraudulent intent. *United States* v. *Regent Office Supply Co., supra* at 1180. Each of the defendants asserts that there was insufficient evidence as to his intent to defraud Zenith of Yonan's loyalty and honesty, but we conclude to the contrary.

As to Yonan, his undisclosed receipt of the kickbacks by itself warrants a finding that he intended to defraud Zenith of his honest and loyal services. His employment duty was to negotiate the best possible deal for Zenith, or at least to apprise Zenith that Greensphan would be satisfied with a lesser profit margin. He is presumed to know that he could not personally profit by any decrease in price he could negotiate with Greensphan[7] and

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[6] The court properly charged the jury as follows:
"Now, to knowingly tamper or interfere with an employer-employee relationship for the purpose of and with the intent of depriving the employer of the employee's honest and faithful performance of his duties for the employer may constitute a fraud within the meaning of the mail fraud statute." See *United States* v. *Procter & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942).

[7] Lest there be any doubt on that score, it may be noted that Yonan twice signed Zenith's conflict-of-interest policy, thus acknowledging this

that any such decrease should be made available to Zenith. In sum, the jury could hardly help but infer that Yonan intended to do exactly what he did. Hence it was not necessary for the jury to conclude that when Yonan received the kickbacks, he intended to defraud Zenith further by giving Greensphan the favored treatment for which Yonan was paid.

The evidence also supports a finding that George contemplated Zenith would be defrauded of Yonan's honest and faithful services. George billed Greensphan for "commissions" on the Circle of Sound cabinets Greensphan sold Zenith though he provided no services to Greensphan. Checks totalling about $100,000, approximately one-third of the commissions, then passed from George to Yonan, with George apparently retaining an unmerited two-thirds. That George's payments to Yonan had their source in Greensphan's commission payments to George is shown by Yonan's call to Greensphan's accountant asking about the commission sums paid to George by Greensphan and by Yonan's checking the shipping quantities on an A & G invoice with Greensphan's plant superintendent. George can hardly claim to have been an unwitting conduit for the payments from Greensphan to Yonan. He submitted spurious invoices based on the number of cabinets Greensphan shipped to Zenith and made an enormous profit in the process. He, Greensphan, and Yonan were mutual friends at the inception of the scheme, and, at least on one occasion, were observed together in Accurate's plant. He must have known Yonan's position at Zenith and the relationship between Yonan and Greensphan. If the substantial payments from Greensphan to Yonan were not designed to compromise Yonan's fiduciary duties to Zenith, why were they not made directly and openly instead of through George and disguised as commission payments to him? Why would the transaction be so shrouded in secrecy and spuriousness if Yonan could legitimately make and hide from Zenith an enormous profit from his employment position or curry Greensphan's favor? It would take a man of incredible naïveté to play George's role in this scheme and not understand that Yonan was giving less than full measure of loyalty and honesty to Zenith. At least he must have known that some actual injury to

Zenith was the reasonably probable result of this scheme. See *United States* v. *Regent Office Supply Co., supra* at 1182.

Having admitted that he agreed to make the kickback payments to Yonan to ensure that he would not lose the Circle of Sound cabinet business, Greensphan argues that he lacked the requisite intent on the ground that he was the victim of extortion. He urges what is really an affirmative defense of extortion. However, he had no contractual agreements entitling him monopolistically to continue to sell cabinets to Zenith. He had no right to be protected from future competition. If he really feared Yonan would wrongfully try to shift the cabinet business to a competitor, why did Greensphan not go to Zenith with the report that Yonan had asked for the kickbacks? He presented nothing to indicate why this course was not open to him. And certainly he could have gone to Zenith when and if Yonan had decided that a less deserving competitor should get the business. Under some circumstances a threat of economic injury may constitute a defense, but not here. Furthermore, since, by Greensphan's own account, Yonan did not actually threaten him with economic harm, the evidence does not support his claim. *United States* v. *Miller*, 340 F.2d 421, 425 (4th Cir. 1965). Accordingly, his tendered instructions B and C were properly refused. Under the evidence Greensphan's payments could be considered by the jury as an attempt to obtain an advantage against competition by purchasing Yonan's loyalty. Greensphan's "theory of defense," to the extent it was valid and supported by evidence, was adequately safeguarded because the instructions given as to intent, "knowingly" and "willfully" as used in the two statutes specified in the indictment permitted the jury to accept the hypothesis that Yonan's economic pressure negatived Greensphan's intent to harm Zenith. Its choice not to do so was supported on this record.

Thus we conclude that there was sufficient evidence for the jury to find that each defendant intended to defraud Zenith.

Admissibility of Zenith's Conflict-of-Interest Policy

The Government introduced Zenith's conflict-of-interest policy as bearing on the knowledge of Yonan and Greensphan. It was clearly admissible for this purpose since Yonan's and Greensphan's knowledge of that policy bore on their intent to defraud, though it was not essential for proving that intent. The record does not show that Zenith's conflict of interest policy was admitted with reference to George's intent. The trial testimony went to connecting the policy with Yonan and Greensphan only. The jury was correctly instructed that admissions, acts or statements of other *defendants* in the scheme were attributable to all only if the jury found the existence of a joint venture and if in furtherance thereof. No error was committed with respect to receiving in evidence Zenith's conflict-of-interest policy for the limited purpose for which it was offered.

Refusal to Sever Yonan from Greensphan's Trial

Yonan claims that Greensphan's defense was antagonistic, thus entitling Yonan to a mistrial and a separate trial. Here we fail to discern any conflict of defense strategies, much less one so irreconcilable "that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *United States* v. *Robinson*, 432 F.2d 1348, 1351 (D.C. Cir. 1970). True, Greensphan testified that Yonan asked him for kickbacks, but Yonan's only real defense to what the Government proved he did was that his conduct could not have defrauded Zenith. This defense would not be undercut because he asked Greensphan for kickbacks, and Greensphan presented the same defense.

Yonan's real complaint is that Greensphan, in an attempt to save himself, made Yonan out to be a blackmailer, and the jurors "could well conceive it their duty to remove such a person from society." But "the mere fact that • • • one may try to save himself at the expense of another is in itself alone not sufficient grounds to require separate trials • • •." *United States* v. *Hutul*, 416 F.2d 607, 620 (7th Cir. 1969), certiorari denied, 396 U.S. 1007. And Greenspan did not save himself. Furthermore, under the instructions given, the jury could not have convicted Yonan of extortion, and we see no substantial prej-

udice to warrant upsetting the presumption that the jurors followed the law as given to them. In sum, having found no clear likelihood of detriment to Yonan's defense or confusion in the jury's mind so great as to prejudice his fair trial, we find the trial judge did not abuse his discretion by trying all participants in the scheme together. *United States* v. *Kahn*, 381 F.2d 824, 838-839 (7th Cir. 1967), certiorari denied, 389 U.S. 1015.

Judgments affirmed.

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APPENDIX "B"

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 5, 1973

Before

Hon. LATHAM CASTLE, Senior Circuit Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 72-1555 vs.
PETER K. YONAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 795
Bernard M. Decker, Judge.

O R D E R

On consideration of the petition of the appellant, Peter K. Yonan, for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an en banc rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the appellant for a rehearing in the above-entitled appeal be, and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-61

PETER K. YONAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his actions in soliciting and receiving "kickbacks" from a supplier of his employer did not constitute fraud as a matter of law, and that he was improperly denied a severance requested on the ground that a co-defendant's defense was hostile to his own.

After a joint jury trial in the United States District Court for the Northern District of Illinois, petitioner and two co-defendants, Greensphan and George, were convicted of eighteen counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner was sentenced to three years' imprisonment. The convictions were affirmed on appeal (Pet. App. A; *United States* v. *George*, 477 F. 2d 508 (C.A. 7)).[1]

[1] Petitioner's co-defendants have petitioned separately for review of the judgment below. See *George* v. *United States*, petition for certiorari pending, No. 73-39; *Greensphan* v. *United States*, petition for certiorari pending, No. 72-1610.

The material facts are set forth in the opinion of the court of appeals (Pet. App. A, pp. 2a-4a; 477 F. 2d at 510-511). Briefly, the evidence showed that from 1961 until 1971 petitioner was employed by the Zenith Radio Corporation as a cabinet buyer. His duties included price negotiations with prospective vendors of cabinets for Zenith's products. In 1966, petitioner was assigned to obtain a supplier for Zenith's new "Circle of Sound" cabinets. Petitioner obtained but one bid, that of Accurate Box Corporation, a company owned by petitioner's friend and eventual co-defendant Greensphan. Accurate set its price to reflect a 10% profit margin, the maximum which Zenith would permit.

In October 1967 petitioner asked Greensphan for a kickback of $1 per unit on every Circle of Sound cabinet sold to Zenith. Greensphan complied. The kickbacks were paid through a complicated series of transactions involving one George, a friend of petitioner and Greensphan, who owned A & G Woodworking Co. Although neither George nor A & G performed any services with regard to the Circle of Sound, it was arranged that A & G would bill Accurate Box Corporation for commissions on the units and that A & G would in turn make payments to petitioner. To disguise the kickback, Accurate's records reflected the payments to A & G as a 3.4% commission on the overall Zenith order, rather than as fixed, per-unit commissions. The Circle of Sound line proved to be highly successful, and, in a three-year period, Greensphan's company paid more than $300,000 in commissions to George's company, and George wrote checks payable to petitioner in amounts totaling in excess of $100,000.

Zenith's conflict-of-interest policy prohibited its purchasing employees from accepting gratuities from sup-

pliers. Petitioner twice signed documents reflecting his recognition of that rule. This policy was also called to the attention of major suppliers, including Greensphan, in annual letters from Zenith.

1. Petitioner argues here, as in the court of appeals, that the kickback money came from Greensphan and not from Zenith and that, since Zenith expressed no dissatisfaction with the Circle of Sound cabinets or with petitioner's performance in regard to the product, the government failed to prove fraud as a matter of law. The court of appeals, in an opinion on which we rely, correctly pointed out that the government was not required to prove that the victim of a scheme to defraud suffered an actual loss (Pet. App. A, p. 8a; 477 F. 2d at 513).[2]

Petitioner's reliance on *Epstein* v. *United States*, 174 F. 2d 754 (C.A. 6), is misplaced, because in *Epstein* the government was unable to show that the defendants had not acted in good faith and for the benefit of the corporations which they directed. Their only breach was the failure to disclose a possible conflict of interest (*id.* at 768-769). The court in *Epstein* expressly distinguished cases where the success of the scheme is dependent upon its concealment (*id.* at 767).

In the instant case, it is plain that petitioner's kickback plan was capable of fruition only because Zenith was unaware of it. The scheme clearly contravened Zenith's conflict-of-interest policy, and it was to conceal the facts from Zenith that the complicated payment system had to be devised. Nor does petitioner's attention to the quality of Accurate's product show, as petitioner implies,

[2] Petitioner does not deny that the mails were used in the conduct of the scheme.

that he was actually a loyal employee of Zenith. Meticulous quality control was very much in petitioner's interest, since it would prevent his superiors at Zenith from becoming suspicious and initiating an inquiry into petitioner's relationship with Accurate.

2. Petitioner also contends that the district court erred in denying his request for a severance, which was based on the theory that defendant Greensphan's defense was antagonistic to his own. Greensphan claimed that the kickbacks had been paid out of fear that he would otherwise lose Zenith's business. Petitioner's defense rested primarily on the theory that the kickbacks did not amount to fraud upon Zenith. As the court below noted (Pet. App. A, pp. 11a-12a; 477 F. 2d at 515), petitioner failed to show substantial prejudice as a result of the joint trial, since the defenses were not actually opposed to one another. Nor, in any event, do antagonistic defenses necessarily entitle the defendants to separate trials. See *United States* v. *Barber*, 442 F. 2d 517, 530 (C.A. 3), certiorari denied *sub nom. Mowbray* v. *United States*, 404 U.S. 846; *United States* v. *Meyer*, 404 F. 2d 254 (C.A. 9), certiorari denied, 394 U.S. 989. Cf. *United States* v. *Abrams*, 357 F. 2d 539, 549 (C.A. 2), certiorari denied, 384 U.S. 1001.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.